

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                     )  
  )  
  )     Criminal Action  
  )  
  )     No. 01-545-1  
DONALD BERRY                                    )

**MEMORANDUM**

**Padova, J.**

**April           , 2002**

Defendant Donald Berry is charged with various offenses in connection with an alleged conspiracy to distribute cocaine.<sup>1</sup> Defendant seeks to suppress evidence seized from his residence and his vehicle on July 4, 2001.<sup>2</sup> Defendant asserts that the search of the home was not performed pursuant to a valid warrant. He further argues that the seizure of the gun from the vehicle was invalid. For the reasons that follow, the Motion is denied.

**I. Search of Defendant's residence pursuant to state warrant**

The Fourth Amendment to the United States Constitution provides:

---

<sup>1</sup>The Second Superseding Indictment charges Defendant with one count of conspiracy to distribute cocaine, four counts of illegal use of communication facility, two counts of distribution of cocaine, and two counts of distribution of cocaine within 1,000 feet of a school.

<sup>2</sup>The items seized from the home included \$48,000 in cash, a clear plastic baggie of alleged cocaine, various documents, papers, and jewelry. From the vehicle, which was parked outside the residence, police recovered a .40 caliber handgun.

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. For issuance of a warrant, a magistrate must determine that there is a "fair probability that . . . evidence of a crime will be found in a particular place." United States v. Zimmerman, 277 F.3d 426, 432 (3d Cir. 2002) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)). The warrant must describe the things to be seized with sufficient particularity and be "no broader than the probable cause on which it is based." Id. (citation omitted).

The search of Berry's house was conducted pursuant to a warrant approved orally over the telephone by Judge Allan L. Tereshko, Judge for the Philadelphia Court of Common Pleas. Detective Freddy Chaves, the investigating officer who prepared the affidavit in support of the warrant, testified that he contacted Judge Tereshko, who was the emergency judge on duty on the evening of July 4, 2001. (N.T. 4/18/02 at 48.) Judge Tereshko swore Detective Chaves over the telephone. (Id. at 49.) The Detective then reviewed the contents of the affidavit with the Judge. (Id. at 49-60.) At approximately 10 p.m., Judge Tereshko granted oral approval for warrants to search Defendant's home and to search a vehicle driven by Co-Defendant Julian Gonzalez. (Id. at 61.)

Judge Tereshko instructed the Detective to bring the affidavit and warrants to him the following morning. (Id. at 61.) That morning, the Judge reviewed the affidavit and signed the warrants, confirming the issuance of the warrants on July 4, 2001 at 10 p.m. (Id. at 61-62.)

After receiving the oral approval of the warrants on the night of July 4, Detective Chaves advised the officers at the scene of Defendant's residence that the warrant had been approved. (Id. at 62.) Detective Sergeant David Traubel received the radio call from Detective Chaves at approximately 10:40 or 10:45 p.m. (Id. at 131.) Detective Sergeant Traubel and several other officers, in Detective Chaves' absence, proceeded to serve the warrant on the house. (Id. at 63, 80, 131-32.) The officers secured the scene and informed Defendant and his family that they had a warrant to search the premises. (Id. at 132-33.) They proceeded to search the house. (Id. at 141.) Detective Chaves arrived at the scene sometime after 11 p.m. (Id. at 80.) By the time the Detective had arrived, police had already seized several items. (Id. at 81.) Detective Chaves testified that he gave a copy of the unsealed portion of the search warrant to Defendant's wife. (Id. at 82-83.)

The search of Defendant's home was conducted by state police without federal involvement. Whether a search conducted pursuant to a state warrant is characterized as "federal" or "state" in a federal prosecution depends upon the extent of involvement of

federal officers. United States v. Bedford, 519 F.2d 650, 653 n.1 (3d. Cir. 1975) (citing Lustig v. United States, 338 U.S. 74 (1949)). Something more than "mere participation" by federal officers must be found before a state search is transformed into a federal undertaking. Id. (citing Byers v. United States, 273 U.S. 28, 32 (1927)). If a search is federal in character, it must conform to federal constitutional requirements and the provisions of Federal Rule of Criminal Procedure 41. Bedford, 519 F.2d at 653 n.1. If a search is a state undertaking, however, assuming the proper issuance of the warrant under state law, it need only conform to federal constitutional requirements. Bedford, 519 F.2d at 653 n.1.

In this case, there was no involvement by federal authorities, and so the issuance of the warrant is governed solely by applicable state law and federal constitutional requirements. State law allows the issuance of a search warrant via telephone and does not require the proceeding to be recorded.<sup>3</sup> Commonwealth v. Long, 786 A.2d 237, 240 (Pa. Super. Ct. 2001). Detective Chaves testified

---

<sup>3</sup>Defendant attempts to distinguish Long based on the court's observation in Long that the identity of the affiant was not in question because the affiant was known to the judge. However, the record and testimony here are sufficient to establish that there was a clear indicia of reliability for the issuing judge to determine that he was speaking with Detective Chaves. In particular, the Detective presented the affidavit and warrant applications to the Judge the following morning, and the Judge confirmed his issuance of the warrants the night before. (N.T. 4/18/02 at 61.) Accordingly, the Court does not view these facts as sufficient to distinguish this case from Long.

that Judge Tereshko was the emergency judge the evening he sought the warrant. (N.T. 4/18/02 at 48.) The Detective requested an in-person meeting with the Judge, (N.T. 4/18/02 at 49), but the Judge informed the Detective that he was not physically able to come meet him, nor was he at a location where the Detective could meet with him in a reasonable time. (N.T. 4/18/02 at 49.) The Detective also requested to send the affidavit to the Judge by facsimile, but the Judge informed him this would not be possible and instead instructed the Detective to review the affidavit's contents over the telephone. (N.T. 4/18/02 at 49-50.) Judge Tereshko swore the Detective over the telephone. (N.T. 4/18/02 at 50.) They reviewed the affidavit (id. at 51-60), and Judge Tereshko provided his oral approval for the warrants at approximately 10 p.m. on July 4, 2001. (N.T. 4/18/02 at 61.) The Court finds Detective Chaves' testimony to be credible and sufficient to establish that the issuance of the warrant was proper under state law. Accordingly, the subsequent search was performed pursuant to a valid search warrant issued in conformance with state law.<sup>4</sup>

---

<sup>4</sup>Furthermore, the Court is satisfied that there was sufficient basis for the issuing judge to determine that probable cause existed to issue the search warrant for purposes of the Fourth Amendment. Probable cause is determined under the totality of circumstances and exists if, "given all the circumstances set forth in the affidavit . . . including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). The court accords great deference, reviewing only for "substantial basis" to issue a search warrant. See United States

The government further argues that even if the warrant was defective, the materials seized in the search should not be excluded because of a good faith exception to the exclusionary rule applies. United States v. Leon, 468 U.S. 897, 922 (1984). Suppression is not an appropriate remedy when government agents conduct a search in objective good-faith reliance on court authorization. Id. at 925; United States v. Hodge, 246 F.3d 301, 307 (3d Cir. 2001). The purpose of suppression is to deter police

---

v. Loy, 191 F.3d 360, 365 (3d Cir. 1999). The court focuses on what information is "actually contained in the affidavit, not on what information an affidavit does not include." Id. (citing United States v. Conley, 4 F.3d 1200, 1208 (3d Cir. 1993)). The Court must confine itself "to the facts that were before the issuing judge, i.e., the affidavit and [does] not consider information from other portions of the record.'" United States v. Hodge, 246 F.3d 301, 305 (3d Cir. 2001) (citation omitted). Doubtful or marginal cases should be resolved in favor of the warrant. See Atiyeh, 2001 U.S. Dist. LEXIS 1837, at \*8 (citing United States v. Ventresca, 380 U.S. 102, 109 (1965)).

In making his probable cause determination, the issuing judge relied on the contents of the affidavit prepared by Detective Chaves. The Detective reviewed the contents of the affidavit with the judge over the telephone after being sworn. (N.T. 4/18/02 at 49-60.) The following morning, Judge Tereshko re-reviewed the affidavit in person and signed the warrant, confirming the date and time that he had given his verbal consent and confirming the warrant's issuance. (Id. at 61-62.) The affidavit contains extensive information from confidential witnesses and informants relating to Defendant's participation in drug sales (See, e.g., Gov't. Ex. C-1 ("Affidavit") at 10-17, 26-31, 32-38, 41-46, 67-77), summaries of direct purchases of illicit drugs from Defendant by an undercover detective (Affidavit at 135-44), summaries of wire intercepts involving conversations relating to drug transactions (id. at 145-214), and other surveillance information relating to the Defendant's participation in drug transaction activity. (Id.) Taken in its entirety, the affidavit contained sufficient evidence upon which the judge could find that probable cause existed to search Defendant's residence.

misconduct and not to punish innocent errors of magistrates or judges. Id. at 916. "The test for whether the good faith exception applies is 'whether a reasonably well trained officer would have known that the search was illegal despite the [judicial] authorization.'" Loy, 191 F.3d at 367 (quoting Leon, 468 U.S. at 922 n.23).

Here, the record reflects that the law enforcement agents proceeded reasonably and in good faith. The Detective followed all of the procedures required by the issuing judge in obtaining the warrant. The Detective attempted to contact judges with whom he had preliminarily discussed the search warrants. (N.T. 4/18/02 at 47.) After being unable to contact those judges, he contacted the City Hall telephone operator who connected him to the emergency judge. (Id. at 48.) The Detective proceeded to seek the warrant over the telephone at the direction of the Judge, who turned down his requests for an in-person meeting. (Id. at 49-51.) The detective relied on the judge's determination of the law. Accord Hodge, 246 F.3d at 309.

Defendant's Motion to suppress physical evidence seized pursuant to the proper execution of the warrant is denied.<sup>5</sup>

---

<sup>5</sup>Based on the testimony presented at the hearing, there does not appear to be any defect in the state police's execution of the search warrant.

B. Seizure of the Gun from Vehicle

Defendant next challenges the seizure of a .40 caliber Smith and Wesson semi-automatic pistol from his White Lincoln Navigator. The car was parked in the driveway of the property. (N.T. 4/18/02 at 65.) Detective Chaves testified that he obtained the keys to the vehicle from Defendant's wife. (Id.) The Detective determined that the vehicle should be seized pursuant to the state forfeiture law. (Id.) He recognized the vehicle as the same one that had been previously used to transfer drugs and pick up monies. (Id. at 65, 98-103.) He intended to move the vehicle to secure location, namely the impound lot of the District Attorney's Office. (Id.) The Detective discovered the gun tucked in the driver's side seat when he opened the front door of the vehicle. (Id. at 66.) He took the gun into custody for safekeeping reasons. (Id.) At no point did the Detective actually search the vehicle. (Id. at 105.)

The seizure of the vehicle, and the subsequent discovery of the gun in plain view, were proper. In order to make this determination, the Court first must examine whether the seizure of the vehicle was authorized by state statute and whether the seizure was consistent with the Fourth Amendment. United States v. Salmon, 944 F.2d 1106, 1119 (3d Cir. 1991) (citing United States v. Bush, 647 F.2d 357, 366 (3d Cir. 1981). Under Pennsylvania law, real property is subject to forfeiture if it is "used or intended to be used to facilitate" the sale or possession of controlled



substances. 42 Pa. Cons. Stat. Ann. § 6801(a)(6)(i)(C) (West 2000). Seizure may be made by law enforcement authorities without process where "there is probable cause to believe that the property has been used or is intended to be used in violation of The Controlled Substance, Drug, Device and Cosmetic Act." 42 Pa. Cons. Stat. Ann. § 6801(b)(4) (West 2000). Here, Detective Chaves recognized the vehicle as the same one that Defendant had previously used during an undercover buy. (N.T. 4/18/02 at 98-103.) The fact that there was probable cause to believe the vehicle made the transaction less difficult was sufficient for seizure of the vehicle in the absence of a warrant under the Pennsylvania forfeiture statute. Salmon, 944 F.2d at 1119. Furthermore, it is sufficient that the Detective Chaves made the probable cause determination. See Salmon, 944 F.2d at 1119. In this case, Detective Chaves determined that such probable cause existed. (N.T. 4/18/02 at 65-66, 98-99.) Furthermore, this warrantless seizure, supported by probable cause to believe the vehicle was subject to forfeiture, does not violate the Fourth Amendment. See Salmon, 944 F.2d at 1119.

Detective Chaves discovered the gun in plain view when he opened the door. The plain view seizure of the gun, which was found subsequent to the proper seizure of the vehicle under state and constitutional law, did not violate the Fourth Amendment. See Horton v. California, 496 U.S. 128, 142 (1990); United States v.

Bell, No.01-691, 2002 WL 171742, at \*3-4 (E.D. Pa. Jan. 31, 2002)  
(upholding plain view seizure of handgun where officer opened door  
of defendant's vehicle to turn off ignition after defendant's  
arrest pursuant to the community care rule and officer saw gun  
sticking out from under the driver's seat in plain view.)

As the seizure of the gun was proper, Defendant's Motion to  
Suppress the gun is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	Criminal Action
v.	)	
	)	No. 01-545-1
DONALD BERRY	)	

**ORDER**

**AND NOW,** this                      day of April, 2002, upon consideration of Defendant Donald Berry's Motion to Suppress (Doc. No. 89), all responsive and supporting briefing thereto, including the supplemental submissions of the parties, and the hearing held before the Court on April 18, 2002, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

---

John R. Padova, J.